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International Arbitration 2022

Netherlands: Law & Practice
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NETHERLANDS

Law and Practice

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1. GENERAL

1.1 Prevalence of Arbitration

In the Netherlands, arbitration is preferred over litigation and is common in certain sectors and industries, such as:

- construction;
- shipping;
- fruit trade;
- trade in oil, fats and oilseeds; and
- transport.

Arbitration is also often agreed between parties to commercial contracts for the resolution of disputes requiring special knowledge of the relevant industry.

Arbitration is also chosen by parties to international contracts, as arbitral awards are enforceable in the 169 states that are party to the New York Convention. Furthermore, arbitration proceedings and awards are confidential (as opposed to litigation in open court) which serves as another incentive for parties to opt for arbitration instead of litigation.

1.2 Impact of COVID-19

In the Netherlands, the COVID-19 pandemic has led to greater use of internet links to attend arbitration hearing by videoconference. This is a direct result of travel restrictions following COVID-19 government measures.

1.3 Key Industries

As arbitration proceedings are confidential, it is hard to say whether particular industries experienced an increase or decrease in arbitration activity in 2021–22.

1.4 Arbitral Institutions

Common arbitration institutions chosen by parties in international contracts are:

- UNUM (formerly called Transport and Maritime Arbitration Rotterdam—Amsterdam (TAMARA));
- Netherlands Arbitration Institute (NAI);
- London Maritime Arbitration Association (LMAA);
- International Chamber of Commerce (ICC);
- Netherlands Oils, Fats and Oilseeds Trade Association (NOFOTA);
- Federation of Oils, Seeds and Fats Association (FOSFA); and
- *Raad van Arbitrage voor de Bouw* (Arbitration Board for the Construction Industry).

UNUM, the LMAA, the NOFOTA, the FOSFA, and *Raad van Arbitrage voor de Bouw* are often chosen because of the industry-specific knowledge required of the arbitrators. The more general arbitration institutes such as the NAI and ICC are chosen because of their proven reliability.

As far as the authors are aware, no new arbitration institutions were established in the Netherlands in 2021–2022.

1.5 National Courts

The Netherlands Commercial Court (NCC) and the Netherlands Commercial Court of Appeal (NCCA) began hearing disputes on 1 January 2019. The NCC is domiciled at the Amsterdam District Court and the NCCA at the Amsterdam Court of Appeal. They were established to handle international commercial disputes in the English language.

2. GOVERNING LEGISLATION

2.1 Governing Law

Book 4 (Articles 1020 to 1077) of the Dutch Code of Civil Procedure (DCCP) contains the legislation governing arbitration in general. Where Dutch law applies in an international dispute,

then those provisions also govern international arbitration.

Book 4 DCCP is largely based on the UNCITRAL Model Law, but is not an exact replica of it.

The main difference between the UNCITRAL Model Law and the legislation in Book 4 DCCP is that the former is intended for international arbitrations, whereas the latter does not differentiate between national and international arbitration.

2.2 Changes to National Law

The present Dutch arbitration legislation came into force on 1 January 2015, and replaced the 1986 legislation. There is no pending legislation which would change the existing legislation.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

An arbitration agreement is an agreement between parties to refer disputes (contractual or non-contractual) to arbitration (Article 1020(1) DCCP).

Parties can also agree to refer questions regarding a legal status or the amount of damages to be paid to arbitration (Article 1020(4) DCCP).

An arbitration clause can also be contained in articles of association or other rules which are binding between the parties (Article 1020(5) DCCP).

An arbitration agreement is proven by a written document or by electronic means (Article 1021 DCCP).

3.2 Arbitrability

The arbitration agreement must not lead to legal consequences which are not at the free disposal

of the parties (Article 1020(3) DCCP). This would concern matters of public policy which affect everyone. An example is the allocation of parental authority over a child.

3.3 National Courts' Approach

The law governing the arbitration agreement will be determined in accordance with Article 10:166 of the Dutch Civil Code (DCC). This Article provides that an arbitration agreement is materially valid if it is valid under the law agreed upon between the parties or under the law of the place of arbitration. Where parties did not agree on a choice of law, the material validity of the arbitration clause will be determined in accordance with the law governing the legal relationship which is subject to the arbitration agreement.

To judge whether an arbitration agreement is enforceable, a court will first have to consider whether it exists (the so-called material validity). If the court establishes that the arbitration agreement does indeed exist, it will subsequently consider whether it is formally valid – ie, the court will consider whether the formal requirements for an arbitration agreement have been met.

The material validity will be determined in accordance with the law governing the arbitration agreement.

If all parties to the arbitration agreement are party to the New York Convention, the formal validity will be determined in accordance with Articles II(1) and II(2) of the New York Convention. If the New York Convention does not apply, the formal validity will be determined in accordance with the law governing the arbitration agreement.

3.4 Validity

Under Dutch law, the rule of separability for arbitration clauses contained in main agreements applies (Article 1053 DCCP). The arbitration

agreement is considered to be a separate agreement.

There must be agreement between the parties regarding the will to arbitrate.

If, for example, a party contends that the main agreement is invalid due to a mistake, the arbitral tribunal may set aside the main agreement without affecting the arbitration clause.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

There are essentially no limits on parties' autonomy regarding the selection of arbitrators. In principle, any person competent to act is authorised to act as an arbitrator (Article 1023 DCCP). However, certain arbitration institutions may have a list of arbitrators from which the arbitrator must be chosen.

4.2 Default Procedures

There are default procedures for the appointment of arbitrators. For example, after each party has appointed an arbitrator, those two arbitrators jointly appoint a third arbitrator as the chairman. If the two arbitrators fail to reach agreement, one of the parties can request the preliminary relief judge of the district court to appoint the third arbitrator (Article 1026(4) DCCP).

If parties fail to select arbitrators via the agreed procedure, a party can request the preliminary relief judge of the district court to appoint an arbitrator or arbitrators (Article 1027(3) DCCP). There is no separate procedure for multiparty arbitrations.

If, by agreement or otherwise, one of the parties has been granted a privileged position in the appointment of the arbitrator or arbitrators,

each of the parties may request the preliminary relief judge of the district court to appoint the arbitrator or arbitrators, regardless of the agreed method of appointing arbitrators (Article 1028(1) DCCP).

4.3 Court Intervention

Courts can intervene in the selection of arbitrators. See **4.2 Default Procedures**. The court can reject a request to appoint an arbitrator or arbitrators if it is immediately evident that there is no valid arbitration agreement (Supreme Court of the Netherlands, 21 October 2011, ECLI:NL:HR:2011:BQ8777).

4.4 Challenge and Removal of Arbitrators

An arbitrator who has accepted his appointment can be relieved of his duty at his own request by the preliminary relief judge of the district court (Article 1029(2) DCCP). He can also be relieved of his duty by the preliminary relief judge of the district court if he is no longer able to fulfil his duty (Article 1029(4) DCCP). At the request of the parties, a tribunal which is unacceptably slow in fulfilling its obligations can be relieved of its duties by the preliminary relief judge of the district court (Article 1029(5) DCCP).

The parties can jointly decide to terminate the appointment of the tribunal (Article 1031 DCCP).

An arbitrator can be challenged if there is justified doubt about his impartiality or independence (Article 1033(1)).

4.5 Arbitrator Requirements

Pursuant to Article 1034(1) DCCP, a person who has been asked to act as arbitrator and who suspects that he could be challenged must report that suspicion and the reasons for it in writing to the person who wishes to appoint him. The same rule is contained in Article 10.3 of the NAI arbitration rules.

Additionally, an arbitrator who, directly upon his appointment, suspects that he could be challenged must report that suspicion and the reasons for it to the parties in writing (Article 1034(2) DCCP).

An arbitrator who, during the proceedings, begins to suspect that he could be challenged must report that suspicion and the reasons for it to the parties and the other arbitrators, if any, in writing (Article 1034(3) DCCP). The same rule is contained in Article 10.6 of the NAI arbitration rules.

Pursuant to Article 10.4 of the NAI arbitration rules, prior to the confirmation of his appointment, each arbitrator must sign a statement confirming his independence and impartiality.

5. JURISDICTION

5.1 Matters Excluded From Arbitration

There are matters which may not be referred to arbitration. See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

Under Dutch law, an arbitral tribunal may decide on its own jurisdiction pursuant to the principle of competence-competence, which is contained in Article 1052(1) DCCP.

5.3 Circumstances for Court Intervention

A court can address an issue of jurisdiction of an arbitral tribunal if a party to litigation before that court contends that the court lacks jurisdiction because there is an arbitration agreement between the parties.

5.4 Timing of Challenge

See **5.2 Challenges to Jurisdiction**. There is no need to go to court because the principle of competence-competence applies.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The tribunal decides in accordance with the applicable law. If the parties so prefer, the tribunal will decide as “good persons in fairness” (Articles 1054(1) and 1054(3) DCCP).

The principle of stare decisis does not apply under Dutch law. Each case is decided in accordance with the facts of the particular case and the law.

The standard of “good persons in fairness” is also known as *ex aequo et bono*. Though the meaning of this standard is difficult to describe, see Meijer in *Tekst & Commentaar Burgerlijke Rechtsvordering*; Article 1053(3) DCCP note 3b.

A tribunal which decides in accordance with the *ex aequo et bono* standard is bound to apply the applicable law.

The standard entails that the arbitrators are bound to mandatory law but not to non-mandatory law.

The instruction for arbitrators to decide *ex aequo et bono* implies a generic authorisation for them to deviate from non-mandatory law.

5.6 Breach of Arbitration Agreement

If the other party disputes the jurisdiction of the court contending that there is an arbitration agreement, the court will decide whether the arbitration agreement is valid and whether the parties agreed to it. If the court finds that there is indeed a valid arbitration agreement in force between the parties, it will hold that it lacks jurisdiction.

There is no such thing as reluctance or willingness of the courts in this respect. The judge or judges will objectively apply the law to the facts.

The law and the facts will lead to a decision, nothing else.

5.7 Jurisdiction Over Third Parties

There is no law allowing an arbitral tribunal to assume jurisdiction over a person that is not party to an arbitration agreement.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

Pursuant to Article 1043b DCCP, an arbitral tribunal is permitted to award the same interim remedies as the court. However, the arbitral tribunal cannot order the attachment of assets.

Usually, an interim remedy will be an order to refrain from doing something or to do something.

6.2 Role of Courts

An arbitration agreement does prevent parties from requesting the court for interim relief (Article 1022a DCCP). A party therefore has the choice of obtaining interim relief via the court or via the arbitration proceedings. The advantage of court proceedings over arbitration is that a judgment obtained in court proceedings is open to appeal, whereas a judgment obtained in arbitration is usually not open to appeal.

Often, interim relief will consist of an order to do something or to refrain from doing something.

A party with a money claim can request the court for permission to attach assets in order to obtain security of payment. Such a party can also request the court to order the other party to pay them a sum of money as advance payment of the claim which is subject to arbitration.

If the court has jurisdiction, it can also grant interim relief in aid of foreign arbitrations.

There is no national legislation regarding emergency arbitration.

6.3 Security for Costs

The court can order payment of security for costs at the request of a party in summary injunction proceedings.

Pursuant to Article 1043b(3) DCCP, the tribunal acting in interim relief proceedings can order each party to provide sufficient security for costs.

At the request of a party, a tribunal can declare an award in first instance directly enforceable even if it is open to arbitral appeal. In that case, the tribunal may set the condition that an amount is paid as security (Article 1061i DCCP).

7. PROCEDURE

7.1 Governing Rules

The rules governing the procedure of arbitration are contained in Articles 1036 to 1048a DCCP.

7.2 Procedural Steps

Subject to the mandatory provisions of Articles 1020 to 1073 DCCP, arbitral proceedings are conducted in the manner agreed between the parties. If the parties did not agree on procedural steps, the arbitral proceedings are conducted in the manner determined by the arbitrators (Article 1036 DCCP).

The most relevant mandatory provision regarding procedure is Article 1026 DCCP which provides that there must be an uneven number of arbitrators or a sole arbitrator.

7.3 Powers and Duties of Arbitrators

Articles 3:296, 3:299, 3:300 and 3:302 of the Dutch Civil Code (DCC) confer certain powers to the court. Article 3:305 DCC provides that arbi-

trators have the same powers unless the parties agreed otherwise.

The powers conferred to the court, and consequently to arbitrators, are:

- the power to order a person to give, do or refrain from doing something (Article 296(1) DCC);
- the power to order a person to do something under a certain condition or within a certain time (Article 296(2) DCC);
- the power to authorise a person to do something himself if another person who should have done that thing fails to do it (Article 3:299(1) DCC); and
- the power to authorise a person to undo what another person did contrary to his obligation to not do what he did (Article 3:299(2) DCC).

The following powers of the court are contained in Article 3:300 DCC:

- if a person is obliged to perform a legal act towards another person, but fails to do so, the court may determine that its judgment has the same effect as a legal deed (ie, document) of the person who was obliged to perform the legal act – alternatively, the court may appoint a representative to perform the legal act (Article 3:300(1) DCC);
- if the defendant is obliged to draw up a deed together with the claimant, the court may determine that its decision will take the place of that deed or part thereof (Article 3:300(2) DCC); and
- the power to determine the legal relationship between persons or legal entities (Article 3:302 DCC).

7.4 Legal Representatives

No qualifications are required for legal representatives in proceedings before the *kantonrechter* (a court with limited jurisdiction).

Legal representatives in proceedings before the other courts must have an LLM degree in Dutch law and be a member of the Dutch Bar Association. Such a person is called an *advocaat* (advocate).

In arbitration, parties can appear in person or can be represented by an advocate or by another person of their choice who has been authorised in writing for this purpose (Article 1038 DCCP).

8. EVIDENCE

8.1 Collection and Submission of Evidence

Unless the parties have agreed otherwise, the admissibility of evidence is at the discretion of the arbitral tribunal.

8.2 Rules of Evidence

The general law of evidence, which will usually apply in arbitrations governed by Dutch law, is that evidence may be provided by all means unless the law provides otherwise (Article 152 DCCP).

In principle, there is no discovery or obligation to disclose evidence. The general rule, which will also usually apply in Dutch arbitration, is that the parties are obliged to submit the facts relevant to the decision fully and truthfully (Article 21 DCCP).

8.3 Powers of Compulsion

Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of either party or on its own initiative, order the parties to provide evidence by hearing witnesses and experts (Article 1041(1) DCCP).

If a witness does not appear voluntarily or refuses to testify, the arbitral tribunal may allow a party to request the preliminary relief judge of the

court to appoint a judge to question the witness (Article 1041a(1) DCCP).

Before handing down an award, the arbitral tribunal may require the claimant to prove one or more of his assertions (Article 4043a(3) DCCP).

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

Although there are no legal provisions regarding confidentiality, the general consensus is that arbitration proceedings are confidential.

For example, Article 6 of the NAI arbitration rules provides that arbitration is confidential and that all persons involved either directly or indirectly shall be bound to secrecy, except and in so far as disclosure ensues from the law or the parties' agreement.

Often, the confidential nature of arbitral proceedings is an important reason for the parties' agreeing to arbitration.

If confidentiality is not regulated in the applicable arbitration rules, the parties to an arbitral agreement can agree to confidentiality in a separate non-disclosure agreement.

The question of whether information in arbitral proceedings may be disclosed will depend on the wording of the non-disclosure agreement.

10. THE AWARD

10.1 Legal Requirements

The arbitral award must be in writing and must be signed by the arbitrator or arbitrators (Article 1057(2) DCCP).

If a minority of the arbitrators refuses to sign the arbitral award or is incapable of signing it, this shall be stated in the award (Article 1057(3) DCCP).

In addition to the decision, the judgment must contain:

- the names and residences of the arbitrator or arbitrators;
- the names and residences of the parties;
- the date of the award;
- the place where the award was given, which is the place of the arbitration (Article 1037(1) DCCP); and
- the grounds for the decision.

The grounds for the decision do not have to be stated in the following cases:

- where the award only concerns the determination of the quality or of the state of a thing (Article 1057(5)a DCCP);
- in the recording of a settlement (Article 1057(5)(b) DCCP); and
- in all other cases if, after the arbitration has commenced, the parties agree in writing that no grounds for the decision will be given – such an agreement is sometimes made in order to reduce the costs of arbitration.

10.2 Types of Remedies

See 6.1 Types of Relief.

10.3 Recovering Interest and Legal Costs

Costs in arbitration proceedings are not regulated by law.

If the matter of costs is not regulated in the applicable rules of arbitration, the parties can make their own agreement regarding costs.

Usually, in arbitration full costs are awarded to the winner, whereby the arbitrators have the discretionary power to mitigate costs as they deem reasonable.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

Appeal is only allowed if parties agree to it (Article 1061b DCCP). Grounds for appeal are not regulated by law. In practice, a party will appeal if he is of the opinion that the arbitral award is based on an incorrect establishment of the facts or an incorrect application of the law.

The appeal must be filed within the term agreed between the parties. If no such term was agreed, it must be filed within three months from the date on which the award was sent to the parties (Article 1061c DCCP).

The statutory provisions which apply in first instance also apply on appeal.

If no appeal was agreed on, the only other possible recourse would be for a party to apply to the court of appeal to set aside the arbitral award (Article 1065 DCCP).

11.2 Excluding/Expanding the Scope of Appeal

Parties can agree on excluding or expanding the scope of appeal or challenge. Under Dutch law, there is freedom of contract, which also applies to the conducting of arbitration proceedings.

11.3 Standard of Judicial Review

The same standard of review for appeal applies as the standard which applies for jurisdiction and admissibility (see **5.5 Standard of Judicial Review for Jurisdiction/Admissibility**).

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

The Netherlands has been party to the New York Convention without reservations since 23 July 1964.

12.2 Enforcement Procedure National Awards

An application to declare an arbitration award handed down in the Netherlands as enforceable is filed at the district court (preliminary relief judge) of the place of arbitration (Article 1062(1) DCCP).

Pursuant to the rules of procedure drafted and applied by the court, the party requesting the award be declared enforceable must submit the following documents with the application:

- if the award was deposited with the registry of the court, a copy of the arbitral award and a copy of the memorial of deposit; and
- if the award was not deposited with the registry of the court, an original copy of the award.

There are additional requirements if the award is against a consumer.

The preliminary relief judge can only refuse to declare an arbitral award enforceable if, after summary examination of the award, it becomes apparent that the judgment shall be set aside because of one of the reasons stated in Article 1065 DCC. Those reasons are that:

- there is no arbitration agreement;
- the arbitral tribunal was not appointed in accordance with the applicable rules;
- the arbitral tribunal did not comply with its instructions;

- the arbitral award does not contain the grounds for the decision or is not signed in accordance with Article 1057 DCCP; and
- the arbitral award, or the way it came about, is contrary to public order.

Foreign Awards – New York Convention

To have a foreign award declared enforceable in accordance with the New York Convention, the following documents must be filed (Article 1075 in conjunction with Articles 985–992 DCCP) at the district court (preliminary relief judge) of the place of residence of the applicant:

- a legalised original of the judgment or a certified copy thereof (Article IV New York Convention);
- a legalised original of the arbitration agreement or a certified copy thereof (Article IV in conjunction with Article II(2) of the New York Convention); and
- a certified translation of the above documents.

Foreign Awards – No Conventions

To have a foreign award declared enforceable in a situation where there is no international convention in place (Article 1076 DCCP), the application is made before the preliminary relief judge of the district court of the residence of the applicant. The applicant must submit the following documents:

- the original award or a certified copy thereof; and
- the original arbitration agreement or a certified copy thereof.

The award will not be declared enforceable if the party against whom recognition or enforcement is sought asserts and proves that:

- there is no valid arbitration agreement under the law applicable to that agreement;

- the arbitral tribunal was not constituted in accordance with the applicable rules;
- the arbitral tribunal did not comply with its instructions;
- the arbitral award is open to appeal;
- the arbitral award has been set aside by a competent authority of the country where that award was rendered; and
- the judge holds that recognition or enforcement of the award is contrary to public order.

Awards Which Have Been Set Aside

In principle, an award which has been set aside by the court in the place of arbitration cannot be recognised or enforced because there is no longer an arbitral award. However, in rare cases recognition and enforcement of an award which has been set aside is possible. That will be the case if the judge who set aside the judgment is not impartial and independent. There are published Dutch judgments in this respect (see Meijer in *T&C Burgerlijk Recht*; Article 1076 DCCP, note 2g).

Awards Which Are Subject to Ongoing Set-Aside Proceedings

In order to prevent a party from delaying enforcement of an arbitral award by commencing set-aside proceedings, an application to set aside an arbitral award does not suspend enforcement (Article 1066(1) DCCP).

However, if there are sound reasons for doing so, the judge who must decide in the set-aside proceedings can, at the request of a party, suspend enforcement until a final decision has been given in the set-aside proceedings (Article 1066(2) DCCP).

Sovereign Immunity

The Supreme Court of the Netherlands (SCN) has held that, in principle, a state or state entity may raise a defence of sovereign immunity to prevent enforcement of a judgment handed

down by a state court (SCN 14 October 2016, ECLI:NL:HR:2016:2354). However, that rule does not apply to the enforcement of arbitral awards under the New York Convention.

Article V of the New York Convention does not name sovereign immunity as one of the reasons for refusing recognition and enforcement of an arbitral award. By agreeing to arbitration governed by the New York Convention, a state waives its right to raise the defence of sovereign immunity (Prof dr CMJ Ryngaert, *Staatsimmunititeit van executie: beslagmogelijkheden voor crediteuren na de herfstarrresten van de Hoge Raad* (2016), TCR 2017, pages 111–118).

12.3 Approach of the Courts

General Approach of the Courts Towards Recognition and Enforcement

See 12.1 New York Convention.

Standards of Domestic or International Public Policy

Courts should exercise restraint when judging whether a foreign award or the way it came about is contrary to public policy (see, for example, SCN 17 January 2003, NJ 2004/384). However, no restraint should be observed if during the arbitral proceedings the fundamental right to be heard was not adhered to (SCN 25 May 2007, NJ 2007/294).

13. MISCELLANEOUS

13.1 Class Action or Group Arbitration

There is no Dutch legislation regarding class actions in arbitration or group arbitration.

13.2 Ethical Codes

An *advocaat* (attorney at law, ie, a member of the Dutch Bar Association) is bound by the code of conduct of the Dutch Bar Association. The code of conduct contains rules relating to the proper conduct of advocacy vis-à-vis the client and third parties. There are rules obliging an *advocaat* to be independent and partial, to exercise confidentiality, to be efficient and transparent, to ensure that he has no conflict of interest and to be clear with regard to costs.

There is no general code of conduct for arbitrators.

13.3 Third-Party Funding

There are no rules or restrictions on third-party funders.

13.4 Consolidation

If the applicable arbitration rules allow consolidation of separate arbitral proceedings, they can be consolidated. For example, Article 39 of the NAI arbitration rules provides that separate arbitral proceedings can be consolidated.

13.5 Binding of Third Parties

In principle, only the parties to the arbitration agreement are bound by it. However, under special circumstances third parties could be bound by an arbitration agreement pursuant to the doctrine of related agreements.

In order to not rule contrary to Article 6 of the European Convention on Human Rights, a court will exercise restraint when construing the scope of an arbitration agreement.

If the court has jurisdiction, it could, in principle, bind a foreign third party to an arbitration agreement. However, this will be a very rare occurrence and under very specific circumstances.

MMRL Advocaten offers legal services in the areas of offshore energy, construction law (including shipbuilding and machine building), commercial law, labour and employment law, and contract law. The firm's lawyers perform

both contentious and non-contentious work, and have a great deal of experience handling both international arbitration cases and cases in the Dutch courts.

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